No. 6042.

IN THE

United States
Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

In the Matter of
JOHN WALMSLEY WILSON,
On Habeas Corpus.

John Walmsley Wilson,
Appellant,
vs.
Walter E. Carr, District Director of District No. 31, United States Immigration Service, at Los Angeles,
Appellee.

BRIEF OF RESPONDENT AND APPELLEE.

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TABLE OF CASES AND AUTHORITIES CITED.

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BRIEF OF RESPONDENT AND APPELLEE.

STATEMENT OF FACTS.

The facts in the case at bar, so far as they are pertinent in this appeal, are as follows:

The appellant John Walmsley Wilson, a citizen of England, first came to the United States in 1900. In 1908, he pleaded guilty in the District Court of Minnesota, to the crime of petty larceny. On the 31st day of January, 1928, he departed from the United States and proceeded

to Tijuana, Mexico, thereafter returning on the same date through the port of San Ysidro, California, since which time he has continued to reside in the United States. On April 5, 1928, the appellant Wilson entered a plea of guilty to an information charging him with grand theft, filed in the Superior Court of the State of California, in and for the County of San Diego. At the time of pleading guilty, the appellant Wilson was released from the county jail of San Diego county under the following probationary order:

> "It is therefore now ordered by the court that the defendant be released from the date hereof until the 1st day of July, 1929, during which time the defendant is committed to the charge and supervision of the probation officer of said county of San Diego, and of this court."

Subsequent to the entry of this order of probation, and on the 19th day of November, 1928, the probation order of April 5, 1928, was modified and it was ordered that the defendant remain on probation on the former order and upon the further condition that he serve one year in the county jail, and the defendant was committed as follows:

> "That whereas the said John Walmsley Wilson, having entered a plea of guilty in this court to the crime of grant theft, it is therefore ordered, adjudged and decreed that the said John Walmsley Wilson be punished by imprisonment in the county jail for the period of one year and then be released on probation."

On the 2nd day of May, 1929, a *nunc pro tunc* order was entered in which the commitment issued pursuant to the order of November 19, 1928, was amended to read as follows:

> "That whereas the said John Walmsley Wilson having entered a plea of guilty in this court to the crime of grand theft,

> It is therefore ordered, adjudged and decreed that the said John Walmsley Wilson shall remain on probation on the former order herein made on the condition, however, that he serve one year in the county jail in the county of San Diego, in the state of California, and then be released and report to the probation officer."

Subsequent to the *nunc pro tunc* order of May 2, 1929, the defendant was released from the San Diego county jail on condition that he report to the probation officer as directed.

Appellant was arrested upon warrant of Secretary of Labor on February 27, 1929, and after hearing and consideration, the Secretary of Labor on August 6, 1929, issued his warrant directing the deportation of the appellant upon the following grounds:

> "1. That he has been convicted of a felony or other crime or misdemeanor involving moral turpitude, to-wit: petty larceny, prior to entry into the United States; and
>
> 2. That he has been sentenced, subsequently to May 1, 1917, to imprisonment for a term of one year or more because of conviction in this country of a crime involving moral turpitude, to-wit: grand larceny, committed within five years after his entry."

ISSUES INVOLVED.

1. Was the conviction of the appellant of the crime of petty larceny in the District Court of Minnesota in 1908 a conviction of a crime involving moral turpitude, prior to entry, within the meaning of section 19 of the Immigration Acts of February 5, 1917, which provides in part as follows:

> "Any alien who was convicted or who admits the commission prior to entry of a felony or other crime

> or misdemeanor involving moral tupitude * * * shall, upon the warrant of the Secretary of Labor, be taken into custody and deported."

2. Was the sentence imposed on appellant Wilson by the Superior Court of San Diego county, California, on the 19th day of November, 1928, "a sentence to imprisonment for a term of one year or more because of conviction in this country of a crime involving moral turpitude committed within five years after the entry of the alien to the United States" within the meaning of section 19 of the Immigration Act of 1917?

If this Honorable Court should decide either of these issues in favor of the respondent, then the holding of the lower court should be sustained and this appeal decided in favor of respondent.

Argument on First Issue.

The respondent respectfully contends that the conviction of the appellant Wilson in the District Court of Minnesota of the crime of petty larceny in 1908 was the conviction of a "crime involving moral turpitude" and cites in support of this contention the following authorities:

Tillinghast v. Edmead, 31 Fed. (2d) 81, C. C. A. 8, in which the court states as follows:

> "From this it appears that theft or larceny was a crime at common law involving an act intrinsically and morally wrong and *malum in se,* and does not acquire additional turpitude from being declared unlawful by the municipal law. In other words, that an act that was at common law intrinsically and morally wrong, *malum in se,* does not become any more or any less so by reason of the fact that the Legislature may see fit to call it a felony, if the thing stolen is of a value exceeding a given amount, or to call it

a misdemeanor, if the thing stolen is of less value. In either case the offense is one involving moral turpitude."

Bartos v. United States District Court for District of Nebraska et al., 19 Fed. (2) 722.

Respondent further contends that the conviction of Wilson was had "prior to entry" within the meaning of section 19 of the Immigration Act of 1917, and in support of this contention desires to call the attention of this court to the case of *Bendel v. Nagle,* 17 Fed. (2d) 719, decided by this court on February 28, 1927, Judge Rudkin writing the decision, in which case this Honorable Court, through Judge Rudkin, states:

"It will thus be seen that deportation was ordered because of the commission of a crime involving moral turpitude in this country prior to the last entry, and the principal contention of the appellant is based upon the ground that such a conviction does not come within the provisions of section 3 of the Immigration Act, excluding aliens who have been convicted of or admit the commission of a crime involving moral turpitude, because the latter provision refers exclusively to *crimes committed without the United States and before entry.*

(1, 2) An alien who voluntarily leaves this country is subject to all the provisions of the Immigration Act whenever he seeks to return. Lapina v. Williams, 232 U. S. 78, 34 S. Ct. 196, 58 L. Ed. 515; Lewis v. Frick, 233 U. S. 291, 34 S. Ct. 488, 58 L. Ed. 967. And when the appellant sought to return to this country after his last visit to Canada he was confronted with the fact that he had been convicted of a crime involving moral turpitude. This conviction was ample ground for his exclusion and deportation, and the fact that the crime was committed and the conviction had in this country was not material. *The law excluded him because of his moral character; the disqualification was personal to himself, and arose*

from his conviction, not from the time or place of conviction. For obvious reasons Congress did not see fit to limit the right of exclusion to crimes committed or convictions had in other countries, and the courts cannot so limit it. See Weedin v. Tayokichi Yamada (C. C. A.) 4 Fed. (2d) 455.

(3, 4) The crime of which the appellant was convicted is usually classed as rape, the statute simply raising the common-law age or consent, and such a crime manifestly involves moral turpitude. Inasmuch as the fact of conviction and the nature of the crime appeared from his own testimony, the appellant was in no wise injured or prejudiced by the other irregularities complained of. Takeyo Koyama v. Burnett (C. C. A.) 8 F. (2d) 941.

The order is affirmed."

Respondent is not unmindful of the case of *Wong You v. Weedin*, 33 Fed. (2d) 377, decided by this Honorable Court on July 1, 1929, opinion written by Judge Dietrich, cited by appellant in his brief, but respondent contends that the Wong You case is not in point with the facts of the case at bar, in that in the Wong You case there had been no prior conviction; there was a question as to whether the offense admitted by the alien was one involving moral turpitude, and the alien in question was a Chinese here under treaty as a Chinese merchant, all of which facts were doubtless taken into consideration by this Honorable Court in its decision of that case. For these reasons we think that the case at bar is differentiated from the Wong You case and that that part of the Wong You case that would seem contrary to *Bendel v. Nagle* should be considered as dicta by this court in its decision of the case at bar.

In enacting the Immigration Act of 1917, and making different requirements as prerequisites for the deportation of aliens who committed crimes prior to entry and those who committed crimes within the country, Congress evidently considered that an alien who was already within the United States should have certain rights and should have a different status than those who were to enter the country and to exclude, if possible, those aliens from entering who were undesirable for having committed offenses involving moral turpitude, no matter whether the sentence was imposed or not. Respondent contends that the appellant was in the same status as any other alien originally entering the country when he last entered the United States from Mexico in 1928; that his prior domicile in the United States gave him no rights, privileges or status other than if he were seeking an original entry and that he must possess the same qualifications and be without the enumerated disqualifications of any other alien who was seeking an original admission; (*Lapina v. Williams,* 232 U. S. 78; *Lewis v. Frick,* 233 U. S. 291) that the intent of Congress was that those aliens coming into the country must not have committed a crime involving moral turpitude for the reason that a person who has committed such an offense is an undesirable alien. Congress was not interested in *where* the alien had committed the crime involving moral turpitude; they were interested in the *character* of the immigrant coming into the country and appellant Wilson being of a *character* that was undesirable as an immigrant, he clearly comes within the intent of Congress to exclude such aliens from entering and to enable the Department of Labor to remove him in the event he should gain entry to the United States.

Argument on Second Issue.

There is no question but that within five years after entry the appellant Wilson was convicted of the crime involving moral turpitude in San Diego in 1928. Counsel for appellant contends, however, that there was not a sentence to "a year's imprisonment" as required by section 19 of the Immigration Act of 1917. Respondent disagrees with appellant's contention and believes that there was "a sentence to a year's imprisonment" imposed because of the conviction of appellant Wilson in 1928. Respondent feels that the only facts necessary to meet the requirements of this portion of the Immigration Act are that the defendant should be sentenced to imprisonment for a period of a year *because* of the conviction of a crime involving moral turpitude. Respondent believes that it is not necessary that the defendant serve his sentence and contends that any order of modification or alteration that might have been made after the sentence was imposed in no way abrogates the effect of the statute. All of the requirements of the Immigration Act have been met when the sentence is imposed because of the crime involving moral turpitude and respondent contends that the probationary order of the 19th day of November, 1928, wherein it was ordered that the defendant remain on probation upon the condition that he serve one year in the County Jail, meets all of the requirements necessary to support the warrant of deportation on this ground as this sentence was imposed because of the conviction of the defendant for grand theft. The fact that the sentence was imposed as a probationary requirement does not make the cause of the sentence any different. The source of the sentence was the wrongdoing of the defendant in committing the crime of

grand theft. Were it not for the commission of the crime, the court would have had no jurisdiction over the defendant whatsoever. It is no offense under the law of the state of California to violate the terms of probation. The sentence was not imposed because of a violation of the terms of probation but the right to sentence and the sentence itself were vested in and ordered by the court because of the commission of the original offense.

The fact that the defendant might be released before the expiration of the sentence is not material in the case. In the case of *Sirtie v. Commissioner of Immigration,* 6 Fed. (2d) 233, District Court of New York, decided April 28, 1925, the court directly passes on this question and states:

> "The term of the sentence is not the time which the offender served before being paroled, because, if that were so, the offender could not be retaken and returned to the reformatory for a violation of his parole, without another trial and conviction; but, the sentence being for the maximum period of three years, the offender can be controlled in his actions by the parole board during that period, whether held in confinement or admitted to parole."

In *Ex Rel Gogoyewicz v. Flynn,* District Court of New York, decided February 3, 1927, 21 Fed. (2d) 590, the defendant was sentenced, the sentence being later suspended because of his marriage to the woman he assaulted and the defendant released on parole. Later he was apprehended because of a violation of his parole on a charge brought against him by his wife for non-support and sentenced for a period of not less than one year, the court there holding that such sentence met the requirements of this particular section of the Immigration Act of 1917 and subjected the alien to deportation.

Insofar as the particular circumstances of the case at bar are concerned, the exact situation confronts this court as confronted the New York court in the Gogoyewicz case cited above, for in the case at bar the appellant was sentenced to a period of one year after he had violated his parole. The fact that the defendant has not served a year and the fact that the sentence was imposed after a violation of a probationary order is not material. The only question that this court should pass upon in deciding this case is the question of the length of the sentence and the cause of the sentence, both requirements as prescribed by the Immigration Act being present.

Reply to Appellant's Brief.

Respondent has answered in his argument under the first issue the contentions set forth in appellant's brief relative to the interpretation of that portion of section 19 of the Immigration Act of 1917 providing for the deportation of aliens convicted of or admitting the commission of a crime involving moral turpitude prior to entry, but at this time desires to comment on the cases cited by appellant in support of his contention not covered in our prior argument on this point. Respondent quite agrees with the law of *Lau On Bow v. United States*, 144 U. S. 47, cited by appellant on page 8 of his brief and believes that the interpretation of the Immigration Act as contained in our argument on the first issue is a sensible construction and will effectuate the legislative intention and does avoid an unjust and absurd conclusion.

The facts in *Ex parte Keizo Shibata*, 35 Fed. (2d) 636, cited by appellant on page 9 of his brief, differ from the facts of the instant case because in the Shibata case the

alien was within the territorial limits of the country and within the jurisdiction of the United States at the time the crime involving moral turpitude was committed and he had not departed from the country subsequent to the commission of such offense and in that case there had been no conviction while in the present case there was a conviction.

In the case of *Squillari v. Day,* 35 Fed. (2d) 284, cited by appellant on page 9 of his brief, there is no statement or ruling on the part of the court that in any way support's appellant's contention, for in that case the Circuit Court of the Third Circuit reversed the order of the District Court dismissing the writ of habeas corpus on the ground that there was "not sufficient evidence" to support the finding that a crime involving moral turpitude had been committed or admitted, and in that case there was no conviction nor was it a case where section 19 of the Immigration Act of 1917 was properly involved as the facts of that case should have been decided upon section 3 of the Immigration Act of 1917. The Squillari case stands on the same basis and is differentiated from the present case for the same reasons and in the same way that *Ex parte Keizo Shibata,* referred to above, differs from the present case.

Ex parte Linklater, 36 Fed. (2) 239, decided by the District Court of New York is differentiated from the case at bar in that in that case there had been no conviction of the alien in question.

Respondent respectfully contends that the attempt on the part of appellant to differentiate the *Bendel v. Nagle case,* 17 Fed. (2d) 719, from the instant case is not a reasonable differentiation for the intent and effect of the ruling

of Judge Rudkin in that case is in the opinion of the respondent such as to clearly bring the instant case within the scope of the decision handed down by this Honorable Court in its decision of that case.

In reply to appellant's contention relative to the interpretation of "a sentence to imprisonment for a period of one year or more" because of the conviction of a crime involving moral turpitude, respondent respectfully contends that *In re McVeity,* 59 Cal. App. Dec. 219, cited by appellant on page 21 of his brief, directly supports respondent's contention as set forth in the argument on the second issue to the effect that the cause of the sentence was the conviction of the crime involving moral turpitude, for in the McVeity case, as in the California law quoted in appellant's brief, there are restrictions placed upon the court imposing a probationary sentence by which restrictions the court is not permitted to impose a greater sentence or a different sentence than that prescribed for the commission of the offense. It is respondent's contention that the California law giving the courts the right in certain cases to grant probation is in effect merely enlarging the powers of the courts in the punishment for violation of laws.

Appellant apparently contends that when a person has been granted probation and the probationary period has expired that the defendant is in the same status as a person who has been pardoned and that the pardon exception of the Immigration Act of 1917 is applicable. The respondent contends that the only pardon that Congress had in mind at the time of the enactment of the Immigration Act of 1917 was an executive pardon and that the peculiar provisions of the California law as construed by the courts

in regard to the absolute wiping out of the criminal records on account of the granting of probation was not such a pardon as is and was included in the Immigration Act of 1917 and it was not the intent of Congress to so include such a pardon as a basis for relieving the alien of the penalty of deportation as a sentence for a period of a year or more because of a conviction of a crime involving moral turpitude.

Conclusion.

FIRST: The conviction of a crime involving moral turpitude by an alien, whether within the United States or without the United States prior to his last entry, is sufficient grounds for his deportation under section 19 of the Immigration Act of 1917.

SECOND: The sentence imposed upon the appellant Wilson by the Superior Court of the County of San Diego was such a sentence under the provisions of section 19 of the Immigration Act of 1917 as to subject the appellant to deportation. The sentence was imposed by the court *because* of the commission of a crime involving moral turpitude and the fact that the appellant was first given probation and later his probation revoked and sentence imposed, and the fact that the appellant did not serve the entire period of a year which was a sentence imposed by the court, should be in no way of interest to this court for the requirements of the Immigration Act have been met by the mere fact of a sentence for a period of a year or more, no matter what further disposition the court may make of that sentence except should the court recommend

that the alien be not deported or should an executive pardon be issued to the defendant, neither of which exceptions are present in the instant case.

Respectfully submitted,

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